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No. 84-1621

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IN THE

Supreme Court of the United States

October Term, 1984

OCCIDENTAL OIL SHALE, INC.,

Petitioner,

v.

STATE BOARD OF LAND COMMISSIONERS OF COLORADO AND ITS MEMBERS, ROWENA ROGERS, JOHN S. WILKES, III AND TOMMY NEAL,

Respondents.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

REPLY BRIEF

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June 28, 1985

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REPLY BRIEF

Petitioner Occidental Oil Shale, Inc. ("Occidental") files this Reply Brief in response to the Brief in Opposition dated June 18, 1985, filed by the Respondents. Occidental's Petition contains a list of its parents and affiliates at page (ii).

SUMMARY OF ARGUMENT

A federal question is properly presented for certiorari review in this case because:

(i) this action involves the grant of school indemnity lands under a solemn agreement between the state and federal government; and

(ii) the Colorado Supreme Court clearly stated that its interpretation of that grant was based on its understanding of *Andrus v. Utah,* 446 U.S. 500 (1980) *("Andrus").*

Occidental seeks certiorari review because the Colorado Supreme Court concluded that *Andrus* repudiated the long-standing principle that equitable title to school indemnity lands vests in a public land state immediately upon selection. Under its interpretation of *Andrus,* the Colorado Supreme Court felt compelled to narrowly construe a Colorado mining location statute. The effect of that construction was to invalidate Occidental's existing mining claims.

Although this case was decided on federal law, Respondents nevertheless urge that this Court deny certiorari review because of possible independent state grounds which might support the decision below. Yet, no such grounds were adopted or even discussed by the Colorado Supreme Court. The clear presentation of a federal question involving an important public land grant and the need to correct the misapplication of federal law make certiorari review appropriate in this case.

ARGUMENT

1. The Colorado Court's decision rests upon federal law; that court's reliance on *Andrus* is clear.

Contrary to Respondents' assertion "[t]hat [the Colorado Supreme Court] decision does not involve a federal question,"[1] this case clearly presents a federal question—the construction of the grant of school indemnity lands pursuant to 43 U.S.C. § § 851, 852 (1982) and the Colorado Enabling Act.[2] The Colorado Supreme Court construed that grant and, in so doing, expressly relied upon the Taylor Grazing Act[3] and the construction of that Act in *Andrus.* The Colorado Supreme Court analyzed *Wyoming v. United States,* 255 U.S. 489 (1921) *("Wyoming"),* and the effect of *Andrus* upon the precedent of *Wyoming.* In *Wyoming,* this Court held that equitable title to selected lands vests upon selection. 255 U.S. at 496-97. Although the vesting of equitable title was not an issue before the State Board or the Denver District Court, it became the determinative issue in the Colorado Supreme Court.

Before this case was appealed to the Colorado Supreme Court, the parties stipulated that Colorado received full equitable title to and interest in the selected lands in accordance with *Wyoming.*[4] The State Board, in administrative action below, maintained that, although Colorado had full equitable title to the selected lands, it could not grant rights in those lands without legal title thereto. On appeal, the Denver District Court reversed the State Board on the

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[1]Brief in Opposition at 5.

[2]Act of March 3, 1875, § 7, 18 Stat. 474.

[3]43 U.S.C. § § 315, 315f (1982).

[4]See Petition, Appendix D at page 14a.

ground that Colorado, holding equitable title, had such an interest in the selected lands so as to open such lands to mineral location under Colo. Rev. Stat. § 36-1-140 (1973).[5]

The State Board and the Denver District Court each determined that Colorado had equitable title, but reached opposite conclusions about the State's ability to open those lands to mineral location prior to obtaining legal title thereto. The State Board believed that it could not commit the lands to mineral location holding only equitable title. However, the District Court concluded that equitable title was sufficient to open the selected lands to mineral location. On appeal, the Colorado Supreme Court disagreed with both the State Board and the Denver District Court because, under its interpretation of *Andrus,* equitable title to selected lands no longer vests upon selection.

> In *Andrus v. Utah,* 446 U.S. 500, 100 S. Ct. 1803, 64 L. Ed. 2d 458 (1980), however, the United States Supreme Court concluded that the nature of the federal government's role in the approval of a state's selection of indemnity lands was altered by a combination of congressional legislation and executive withdrawals of federal lands from disposal after *Wyoming v. United States* was decided.

Occidental Oil Shale, Inc. v. State Board of Land Commissioners, 692 P.2d 321, 324 (Colo. 1984). The Colorado Court went on to conclude that *Andrus* had "undermined" the precedent of *Wyoming.* The court reasoned that because substantial changes had occurred in the nature of the federal role after *Wyoming,* public land states had been divested of the equitable title to selected lands described in *Wyoming.* Respondents' contention that the Colorado

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[5]See Petition, Appendix C at page 12a.

Supreme Court did not hold that equitable title does not vest upon selection (Brief in Opposition at 10) is just not credible, as evidenced by the following statement of that court:[6]

> The foundation in *Wyoming v. United States* for the conclusion that the state has an equitable interest in selected lands has been undermined by the subsequent legislation and executive action described in *Andrus*.... Therefore, contrary to the situtation existing at the time *Wyoming v. United States* was decided, a state now obtains no assurance that it will receive all or any selected indemnity lands until the Secretary of the Interior makes the discretionary classification decision.

692 P.2d at 324. Without question, the Colorado Supreme Court based its decision upon federal law; it cited *Andrus* six times, and *Wyoming* seven times, and failed to cite any independent authority or reasoning under Colorado law which the Respondents now claim exists.

This Petition should be granted because the Colorado Supreme Court has erroneously extended the holding of *Andrus* beyond the intention of this Court by assuming that because the Secretary of the Interior is entitled to classify lands as proper for acquisition through selection, no rights to selected lands vest "until classification." 692 P.2d

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[6]Furthermore, Respondents' assertion (Brief in Opposition at 11) that "[t]hroughout this case, the Colorado Land Board has maintained that it obtained an equitable interest in the selected lands upon the filing of its selection list" directly contradicts positions taken by Respondents during oral argument before the Colorado Supreme Court, as well as Respondents' reliance upon the Utah Supreme Court interpretation of *Andrus* in *Justheim v. Division of State Lands*, 659 P.2d 1075 (Utah 1983)—a case holding that selecting states obtain *no* interest in selected lands upon selection.

at 324. See Petition at 10-11. Certiorari review of this case is appropriate to correct a mistaken interpretation of federal law, so that questions of state law may be reconsidered free from such misunderstanding. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 104 S.Ct. 2267, 2277 (1984). *See also South Dakota v. Neville*, 459 U.S. 553 (1983); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977); *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 630-32 (1973).

2. The Colorado decision contains no plain statement that the case was decided on state grounds.

Respondents' contention that the decision below rests on state law is wholly inconsistent with the clear language of the Colorado decision.[7] Respondents suggest that this Court undertake a review of Colorado law to find possible, but unmentioned, independent state grounds to support the decision below. Such a review is inconsistent with this Court's determination that:

> when ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that

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[7]Moreover, Respondents' contention that Occidental did not follow the applicable mining law is without merit. There are neither findings nor evidence in the record to support findings that "Occidental attempted to circumvent the usual mineral leasing practices of the Colorado Land Board" as suggested by Respondents in their "Statement of the Case." See Brief in Opposition at 2. The Denver District Court upheld Occidental's mineral locations as lawful, and the Colorado Supreme Court reversed the lower court solely because of its interpretation of *Andrus*.

> the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 3476 (1983). Accordingly, this Court will not infer from all possible sources of state law what the Colorado Supreme Court might have meant. The decision of the Colorado Supreme Court rests primarily on that court's interpretation of *Andrus*. There is no suggestion, much less a plain statement, that the Colorado Court relied upon *Andrus* only for purposes of guidance, or that the court decided the case on state grounds.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Colorado Supreme Court.

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